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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-5152

GERALD SCANDRETT,

Petitioner,

vs.

JOHN W. TURNER, Warden, Utah State Prison,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Although respondent agrees with petitioner's statement of the case, he feels that additional facts should be set forth for the Court.

Petitioner's motion to suppress was based on the allegation that the statements were obtained in violation of *Miranda* v. *Arizona*, 384 U. S. 436 (1966), in that (1) the warning given petitioner was inadequate and (2) any waiver by petitioner of his *Miranda* rights was not done

intelligently since petitioner was too intoxicated to know what he was doing (R. Vol. 3, p. 52).

The state trial court denied the motion to suppress after hearing testimony from the petitioner, from an expert, Dr. Stewart C. Harvey, after listening to the taped confession, and after listening to arguments of counsel.

Petitioner testified that, although he had never been warned "officially" of his constitutional rights prior to the day in question, he did know of some of those rights from what he had read in newspapers and seen on television (R. Vol. 3, p. 7). He testified that he knew:

(a) that anything he told the police could be used against him (R. Vol. 3, p. 10);

(b) that he did not have to tell the police anything (R. Vol. 3, p. 10);

(c) that he was entitled to an attorney (R. Vol. 3, p. 10); and

(d) that he was entitled to have an attorney present when he was questioned (R. Vol. 3, p. 11).

From the record, it is clear that the petitioner was warned "officially" of his constitutional rights at least twice. He was first advised at the time of his arrest at the scene (R. Vol. 3, p. 63) and was advised again prior to confessing at the police station (R .Vol. 3, p. 49). After both warnings, petitioner indicated that he understood the rights of which he had just been advised (R. Vol. 3, pp. 50 and 63). After the second warning in response to the question, "Do you still wish to talk to us?" petitioner replied, "I still want to tell you exactly what happened" (R. Vol. 3, p. 50).

Although Dr. Harvey testified that, in his opinion, there was a 100 percent probability of impairment in a person whose blood alcohol level was .26 (R. Vol. 3, p. 32), he also stated that . . ." in terms of extent of impairment, this is, of course, a very *unprecise* thing to speculate about . . ." (R. Vol. 3, p. 32). (Emphasis added.) Dr. Harvey also admitted that "impairment" is a relative thing (R. Vol. 3, p. 30), and that as far as impairment is concerned, the amount of alcohol consumed does not matter as much as the way it affects a particular individual (R. Vol. 3, p. 31). Yet, he also admitted that he had never talked to the petitioner about the events surrounding the alleged crime and, in fact, had never even seen the petitioner until the trial (R. Vol. 3, p. 31). Clearly, Dr. Harvey had not seen the petitioner under the influence of alcohol and candidly admitted that seeing the petitioner at the time would have been "immeasurably helpful" (R. Vol. 3, p. 39). In fact, all of Dr. Harvey's experiments had been performed with medical students (R. Vol. 3, p. 23) whose blood alcohol content never exceeded .1 (R. Vol. 3, p. 30). Thus, Dr. Harvey's testimony as to the effects of alcohol on a person having a blood alcohol level of .26 percent was based entirely on his education and reading as to how most persons would react. He stated:

> "At this level, more than 90 percent of individuals—and this includes persons who are chronic alcoholics—will be rather grossly impaired, so that their impairment is obvious to lay observers. This is manifested, not only in their inability to navigate, properly, but also, in their slurred speech and their incoherentness in their speech." R. Vol. 3, p. 32.

The state trial court in ruling on the motion to suppress (R. Vol. 3, pp. 52-55) stated:

> "As I recall, in the testimony there was some reference to slurred speech; . . . Under rather long experience, slurred speech has been an indication of one impaired by intoxicants.
>
> "I got no evidence of slurred speech in anything that the defendant said on that tape." R. Vol. 3, p. 52.

The court then went on to discuss other criteria of intoxication. It said:

> "If it is halted, if the thought is interrupted —it isn't related to the subject of the conversation these are indications of thought impairment; during the course of the conversation he recollected promptly. Finally, he said 'I want to tell what happened.'" R. Vol. 3, pp. 52-53.

In discussing Dr. Harvey's testimony the Court said:

> "But much depends upon the reaction of each individual person. The individual capacity; now, he said some folks are affected with one drink of beer—one glass of beer; and that, finally, he would have to know, as I got the effect of his testimony, that, rather than an imprecise evaluation that he was giving us on the witness stand—he used the word 'imprecise,' he would have to know what this defendant's personal reaction in the use of alcohol is—was." R. Vol. 3, pp. 53-54.

Finally, the court said:

> "The witness recalled everything that was asked him except one thing; that is, whether or not

he was given a warning. Only thing he couldn't remember is, according to his own testimony, he remembered, clearly, that he had a couple of cups-full half-an-hour before, of liquor, or other intoxicants.

" 'Talked about one, 4:30, last drink, cup-full, last prior drink of alcohol,' and he answered, indicating he remembered all the incidents. At 6:00 o'clock, he remembered all the incidents of the occurrence leading to the stabbing. His own testimony, he said, at times, he blacked out; couldn't remember when he blacked out, but there is no evidence on this night, he blacked out.

"On the contrary, he remembered who was there; remembered what he said, 'Where is my dollar? What did you do with my dollar?' There is no halting speech; there was no fumbling for words; no slurring.

"Motion to suppress is denied." R. Vol. 3, pp. 54-55.

On the following day, the petitioner was tried before the court without a jury. It was stipulated that, if the State were to call witnesses, they would testify to the following facts (found in R. Vol. 3, pp. 61-65):

That, on November 8, of 1968, in Room 311 at 123 South West Temple in Salt Lake City, the defendant, Gerald Scandrett, one Quimby Ferguson and a Tony Joseph Trujillo were, and had been, drinking. That, at approximately 9:30 or 10:00 o'clock in the morning, Tony Trujillo was given $1 to go to the liquor store and obtain a quart of wine—or a fifth of wine. That he asked for an additional quarter to have a beer while he was waiting for the liquor

store to open; and, after he had received this money from either Mr. Scandrett or Mr. Ferguson, he left the premises.

That Mr. Scandrett and Mr. Ferguson continued to drink throughout the day. That, at approximately 4:30 p.m., Mr. Trujillo returned to Room 311 and walked in. He did not have the wine there, at that time; and, in effect, there was some discussion about him being there, without the wine.

The defendant, at that time, stated he would cut his throat — referring to Mr. Trujillo — and Mr. Trujillo said, "You wouldn't dare," at which time, the defendant reached over on a table in this particular room, which is a one-room apartment, and took a knife and stabbed him in the chest. That that stab wound was in the left anterior thorax, and perforated the left ventricle of the heart; that, at that particular time, the victim was pushed out of the room into the hallway by the defendant, the door was closed, and defendant went back and sat on the bed with Quimby Ferguson.

That after thinking it over for a short period of time, he decided that he had better call the police, and he notified the room clerk to call the police, which the room clerk did. That the time of this particular stabbing was approximately 4:50 p.m.

That at about 5:01, the first officer arrived, and found the victim in the hallway, examined him, and found that he was still alive. That the door was open, and the defendant and Mr. Ferguson were seated on the bed. At that time, the officer heard the defendant say, "I did it; I did it; my fingerprints are on the knife." That, shortly thereafter,

Captain Don Ferguson of the Salt Lake City Police Department arrived; and, after a brief inquiry as to what had happened, seeing the defendant and after having him identified as the person who had stated, "I did it; I did it; my fingerprints are on the knife," placed the defendant under arrest and advised him of his rights by giving him the *Miranda* warning. That the defendant, at that time, indicated that he understood his rights, that he understood the language in which Captain Ferguson gave him the warning; and, subsequently, stated that he knifed the victim. That prior to being taken to the police station, he said he had used the butcher knife that was lying on the table and stated that it was his intention to kill Mr. Trujillo.

That Captain Ferguson and Officer Leary had, at the scene and on the way to the police station, asked questions and received statements from the defendant. That Captain Ferguson had asked him — or did ask him on the way to the Hall of Justice — when he had decided to stab the victim; and the defendant stated that it was just when he was reaching for the butcher knife; just a couple of seconds before he actually did stab him. That he did, both at the scene and enroute to the station, make these statements that were overheard by Officer Leary; that he hit him hard, and he meant to hit him hard; that he did not hold back on the blow; and was surprised how easily the knife went in. That he did want him to die; he was ready to take punishment for it because he had done it; that he might not have done it if he had not been drinking.

That the victim was removed shortly after the police

officers first arrived, was taken to the St. Marks Hospital and, at that time, was pronounced dead by Dr. LeRoy Chad Halverson, that a post-mortem examination was held by Dr. James Weston, who verified the cause of death.

That the officers who observed the defendant would state he had been drinking to an extent that the amount that he drank would show that he was somewhat under the influence of alcohol but that he did speak coherently; that he appeared to understand questions that were put to him, and, in response to those questions, made intelligent, spontaneous answers. That their testimony could be that, in their opinion, he was drunk, but not drunk to the extent that did not know what he was doing. That, subsequent to this time — in fact, at 5:50 p.m., after he had arrived at the Metropolitan Hall of Justice, he was taken up to the Detective Division of the Salt Lake City Police Department, and Office Floyd Ledford advised him as to his rights under *Miranda*, and he was interrogated.

That that interrogation was recorded on tape, in full, and it was before the court as evidence.

It was also stipulated that the defendant would testify in accord with what the State's witnesses would testify to except that he would testify that he asked Tony Trujillo to leave the room and that he refused to leave; that he did, then, take a knife intending to scare Trujillo but did not intend to do bodily harm nor to kill (R. Vol. 3, pp. 67 and 68).

The court found the petitioner guilty of murder in the second degree.

ARGUMENT

POINT I.

PETITIONER'S STATE OF INTOXICATION DID NOT DEPRIVE HIM OF THE REQUISITE MENTAL CAPACITY TO KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVE HIS CONSTITUTIONAL RIGHTS.

Respondent agrees with the petitioner that the accused must not only be advised of his right to remain silent and other rights, but also, that he must understand those rights and knowingly and intelligently waive those rights before any statement made by the accused can be admissible. Respondent further agrees that the state has a heavy burden to show that the petitioner knowingly and intelligently waived those rights.

The record is clear that the state readily met that burden in the instant case. The evidence introduced by the state clearly showed that the petitioner was coherent, rational and responsive at all times when he was questioned by the police. It is and was admitted that the petitioner was intoxicated or "impaired." However, the issue, then and now, is whether the petitioner was so grossly "impaired" as to render him incapable of giving a confession which is the ". . . product of a free intellect . . ." *Townsend* v. *Sain*, 372 U. S. 293, 83 S. Ct. 745, 754 (1953).

People v. *Roy*, 49 Ill. 2d 113, 273 N. E. 2d 363 (1971), is distinguishable on its facts since in that case the accused kept saying "what?" after the Miranda warning, was swaying, and did not volunteer any information. He was de-

scribed as being *very confused*. 273 N. E. 2d at 364 (emphasis added).

Nor is *Logner* v. *North Carolina*, 260 F. Supp. 970 (M. D. M. C. 1966), aff'd 292 F. 2d 222, *cert. den.*, 393 U. S. 857, of any assistance to the petitioner since the accused in that case was too drunk to even explain the wreck. More importantly, however, the accused in that case was under the influence of both alcohol and drugs, whereas petitioner was solely under the influence of alcohol. This distinction is critical because when alcohol and drugs are combined, "coherence, rationality, and responsiveness . . . are material only in determining the extent to which alcohol alone may have impaired his mental facilities, they shed no light on the effect of the . . ." drug that was taken. *People* v. *Gurley*, 100 Cal. Rptr. 407, 417 (1972); *see also In re Cameron*, 439 P. 2d 633 (Cal. 1968).

All that petitioner's evidence showed, if believed, was that about 90% of the people with a blood alcohol level of .26 would be grossly impaired and that impairment would be obvious since it would be manifested in their inability to navigate properly, in their slurred speech, and in their incoherentness (R. Vol. 3, p. 32). Yet, other evidence clearly demonstrated that the petitioner's speech was not slurred and that he was very coherent and rational.

Furthermore, it should be noted that "the drunken condition of an accused, when making a confession, unless such drunkeness goes to the extent of *mania* does not affect the admissibility in evidence of such confession, but may affect its weight and credibility . . ." *Mergner* v. *United States*, 147 F. 2d 572 (D. C. Cir. 1945); *see also*: *Fant* v.

Peyton, 303 F. Supp. 457 (W. D. Va. 1969); *Gladden* v. *Unsworth*, 396 F. 2d 373 (9th Cir. 1968); and *McAffee* v. *United States*, 111 F. 2d 199 (D. C. Cir. 1940).

The Oregon Supreme Court in *State* v. *Smith*, 476 P. 2d 802 (1970), stated the law properly when it said:

> "The fact that an individual has been drinking, or even the fact that he has been drinking to the extent that he is under the influence of intoxicants, does not necessarily mean that he cannot understand advice and cannot be bound by his subsequent conduct in electing to waive the rights of which he is advised. However, if by reason of *extreme* intoxication a confession cannot be said to be the product of a rational intellect and a free will, it is not admissible." 476 P. 2d at 804 (emphasis added).

Since alcohol affects different people differently, courts must and do look at evidence other than simply the blood alcohol content. *See*, for example: *In re Cameron, supra; Lonquest* v. *State*, 495 P. 2d 575 (Wyo. 1972) and *People* v. *Stroud*, 78 Cal. Rptr. 270 (1969).

As was indicated in *Boulden* v. *Holman*, 394 U. S. 478, 89 S. Ct. 1138 (1969), the question of whether a confession is voluntary turns on the totality of the circumstances. Another important rule was stated by the court in *Moser* v. *United States*, 381 F. 2d 363, 364 (9th Cir. 1967), when it said:

> "Whether a confession is voluntary depends upon the facts that surround it, and the judge's decision is final as to its competence except in those cases . . . in which the finding of fact is plainly untenable, (citations omitted)."

It is plain, then, that when the totality of the circumstances are considered, the court reached the proper decision when it found that the confession was voluntary.

POINT II.

PETITIONER'S CONFESSION WAS NOT RENDERED INADMISSIBLE BY THE CONTINUATION OF QUESTIONS AFTER PETITIONER ALLEGEDLY REQUESTED COUNSEL.

Again, respondent agrees with the law as stated by the petitioner. However, respondent does not view the statements of the petitioner as any indication of a desire "to consult with an attorney before speaking" (*Miranda*, 384 U. S. at 444-445) or as an indication that the petitioner wished to remain silent which would, under *Miranda*, require the police to cease questioning.

The petitioner was being advised of his rights under *Miranda*. Even if his statements are viewed as expressing a desire for counsel, they do not express a wish to consult with counsel before speaking, which is what *Miranda* requires. This is made extremely clear by the subsequent responses of the petitioner. After being advised of his rights, he stated that he understood them and that he still *wanted* to tell exactly what happened.

United States v. *Nielson*, 392 F. 2d 849 (7th Cir. 1968), is clearly distinguishable from the instant case. After Nielson had been advised of his rights and had read a statement of those rights which was on a "waiver of rights" form, he said: "I am not going to sign this document. I have an attorney . . . and I am not signing anything, including this

form, until I have occasion to talk to Mr. Wolfson." 392 F. 2d at 851. Later, after the accused had made what the court termed an "equivocal invitation" (*Id.* at 853) to the police to continue questioning, the police interrogated Nielson and received negative answers. Those negative answers were admitted into evidence and the jury was told that they could consider them as an indication of consciousness of guilt on the part of the accused. *Id.* at 851. There was no hearing outside the presence of the jury to determine whether the statements were made in the absence of an intelligent and voluntary waiver. *Id.* at 852. Thus, Nielson indicated an absolute refusal to even sign a form, let alone to say anything, until *after* he had had an opportunity to consult with counsel. Even if petitioner's statements are viewed as a desire for counsel, they do not express a desire for counsel *before* saying anything to the police. Thus, *Nielson* is not factually similar enough to the instant case to warrant any reliance on that case.

From the facts of the instant case, it is clear that the petitioner was not indicating a desire to remain silent or a desire to consult with counsel before saying anything further. Petitioner was also given a hearing outside the presence of the jury — unlike Nielson.

POINT III.

THE STATE TRIAL COURT RULED CORRECTLY ON THE PETITIONER'S MOTION TO SUPPRESS, BUT EVEN IF IT HAD ERRED THAT ERROR WOULD BE HARMLESS AND WOULD NOT PREJUDICE THE PETITIONER.

As shown in Point I, supra, the state trial court reached the proper decision when it found that the confession was voluntary and denied petitioner's motion to suppress.

It should be further noted, however, that even if the confession were involuntary that that would not necessitate a reversal since the confession was not heard by a jury, but only by the court, and because there was sufficient other evidence to support the verdict.

Since the confession was heard only by a court and not by a jury, *Jackson* v. *Denno*, 378 U. S. 368 (1964) is clearly distinguishable.

Furthermore, since *Miranda* applies only to "custodial interrogations" (384 U. S. at 444), it does not apply to those statements made by petitioner prior to his being taken into custody. Thus, the statement, "I did it; I did it; my fingerprints are on the knife," which statement was made prior to petitioner's being taken into custody and prior to his even being questioned, was clearly admissible. Moreover, *Miranda* specifically states that voluntary statements are not barred by the Fifth Amendment or affected by the *Miranda* decision. 384 U. S. at 478.

This statement alone in conjunction with the other stipulated facts before the trial court, not including the taped confession or any statements made after petitioner was taken into custody, would be more than adequate evidence of guilt to support the court's verdict. The admission of the confession would at most be viewed as harmless error under *Harrington* v. *California*, 395 U. S. 250 (1969), since the other untainted evidence provided overwhelming support for the conviction.

CONCLUSION

Respondent respectfully submits that the state trial court properly determined that the petitioner's confession was made after an intelligent, knowing and voluntary waiver of his right to remain silent and his right to counsel. Thus, the confession was properly admitted into evidence.

Further, other untainted evidence before the state court overwhelmingly supported the finding of guilt.

The United States District Court for the District of Utah, Central Division, after making an independent determination, by reviewing the records of the state trial court proceedings, by studying memoranda of counsel, and by hearing arguments of counsel, found that the petitioner had received a fair hearing on the issues raised, and that there was factual and legal support for the state court's decision. Thus, the lower court denied petitioner's petition for a writ of habeas corpus and this decision was affirmed by the United States Court of Appeals for the Tenth Circuit.

The decisions of the Court below should be sustained.

Respectfully submitted,

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